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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and rules involved	2
Statement	2
Specification of errors to be urged	5
Reasons for granting the writ	6
Conclusion	15
Appendix	16–18

CITATIONS

Cases:

Erwin v. *United States*, 97 U. S. 392 — 8
Federal Housing Administration v. *Burr*, 309 U. S. 242 — 6, 14
Goodman v. *Niblack*, 102 U. S. 556 — 8
Hobbs v. *McLean*, 117 U. S. 567 — 8
Houston v. *Ormes*, 252 U. S. 469 — 8
Howe & Co. v. *United States*, 24 C. Cls. 170 — 10, 11
Jackson v. *United States*, 27 C. Cls. 74 — 11
Leather and Leigh v. *United States*, 61 C. Cls. 388 — 11
Lynn v. *United States*, 110 F. (2d) 586 — 12, 13, 14
Martin v. *National Surety Co.*, 300 U. S. 588 — 8
Monro v. *United States*, 303 U. S. 35 — 13
Penn Co. v. *Pennsylvania*, 294 U. S. 189 — 13
Price v. *Forrest*, 173 U. S. 410 — 9
Seaboard Air Line Ry. v. *United States*, 256 U. S. 655 — 8
Waite v. *United States*, 57 C. Cls. 546 — 11
Western Pac. R. R. Co. v. *United States*, 268 U. S. 271 — 8

Statutes:

Revised Statutes, Sec. 3477 (31 U. S. C. 203) — 6, 7, 8, 9, 10, 16–17
Tucker Act, Section 24 (20) of the Judicial Code (28 U. S. C. 41 (20)) — 16
New York Civil Practice Act, Sec. 795 — 10, 17–18

Rules:

Federal Rules of Civil Procedure:

Rule 17 (b) — 11, 12, 13, 18
Rule 20 — 13
Rule 82 — 13

266728—40——1

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB L. SHERWOOD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals entered in the above case on July 12, 1940.

OPINIONS BELOW

The order of the United States District Court for the Eastern District of New York (R. 31) was entered without an opinion. The opinion of the Circuit Court of Appeals (R. 33–42) is reported in 112 F. (2d) 587.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 12, 1940 (R. 42–43). The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a creditor on a judgment obtained in a New York state court against his debtor may, by virtue of Section 795 of the New York Civil Practice Act, maintain an action against the United States under the Tucker Act for recovery on a claim of the judgment debtor against the United States.

2. Whether the maintenance of such an action is prohibited by Revised Statutes 3477 governing the transfer of claims against the United States.

3. Whether the District Court has jurisdiction under the Tucker Act where the judgment debtor is joined as party defendant.

4. Whether the jurisdiction of the district courts under the Tucker Act has been enlarged by the Federal Rules of Civil Procedure.[1]

STATUTES AND RULES INVOLVED

The applicable portions of the statutes and rules involved are set forth in the Appendix, *infra,* pp. 16–18.

STATEMENT

On April 1, 1939, respondent Sherwood brought suit against the United States under the Tucker

[1] If this petition is granted, the Government will also argue the question whether the United States is a "person" within the meaning of Section 795 of the New York Civil Practice Act.

Act[2] in the United States District Court for the Eastern District of New York, alleging that one Kaiser had entered into a contract with the United States, and that the United States had breached the contract. The complaint alleged that pursuant to Section 795 of the New York Civil Practice Act suit was brought pursuant to an order of the Supreme Court of New York, Queens County, which order had duly authorized and empowered the respondent to maintain the action as a judgment creditor of Frederick M. Kaiser who had a claim against the United States for breach of contract.[3]

Three causes of action, amounting respectively to $10,000, $3,085.45, and $1,360.00, were set forth in the complaint, and judgment in the amount of $10,000 was sought (R. 23–30). Pursuant to the

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[2] Sections 24 (20) and 145 of the Judicial Code.

[3] Kaiser entered into a contract with the United States on January 27, 1933, for the construction of a post office at East Greenwich, Rhode Island (R. 6). On September 25, 1933, the United States, being dissatisfied with the progress then being made, notified Kaiser and his surety that the right to proceed was terminated (R. 7). The right to proceed was restored on October 28, 1933, at the surety's request (R. 7), and Kaiser was authorized to proceed on December 16, 1933 (R. 9). Kaiser, however, failed to perform any work subsequently, and on January 26, 1934, Kaiser and his surety were again notified of the termination of Kaiser's right to proceed (R. 9). The surety notified the Government on April 4, 1934, that it did not elect to complete the work (R. 9). Pursuant to an invitation to bid, the contract to complete the work was awarded to another concern, and the work was completed on August 2, 1935. The loss incurred by the Government was $15,861.85 (R. 9).

New York statute, Kaiser was named defendant in the action (R. 23–28).[4]

Prior to institution of the instant suit the United States on January 17, 1939, had brought an action against Kaiser and his surety, the Fidelity & Deposit Company of Maryland, in which the United States asked judgment in the sum of $15,861.85 as a result of Kaiser's failure to perform his contract (R. 10). Both Kaiser and his surety appeared, answered, and demanded a jury trial (R. 10).

By agreement of counsel, the two actions were consolidated (R. 15). Thereafter, counsel for the Government concluded the consolidation was improper (R. 16), and moved to vacate the order of consolidation, and to dismiss the complaint of Sherwood (R. 4, 5). The order of consolidation was vacated (R. 31), and the motion to dismiss the complaint was granted (R. 3–4). On appeal from the order of dismissal, the Circuit Court of Appeals for the Second Circuit reversed. The court held that, under Rule 17 (b) of the Federal Rules of Civil Procedure, the respondent's "capacity to sue" was governed by the law of his domicile, and that Section 795 of the New York Civil Practice Act conferred authority for the maintenance of an

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[4] On January 20, 1939, Sherwood brought an action against the United States for $10,000, alleging an assignment of Kaiser's claim against the United States for breach of contract (R. 10). On March 30, 1939, that action was dismissed on the ground that it was in contravention of Section 3477 of the Revised Statutes (R. 10, 15).

action in the federal courts on the claim of the judgment debtor. The court further held that the maintenance of the action was not prohibited by Revised Statutes 3477 restricting the transfer of claims against the Government.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that a creditor on a judgment obtained in a New York state court against his debtor may, by virtue of Section 795 of the New York Civil Practice Act, maintain an action against the United States under the Tucker Act for recovery on a claim of his judgment debtor against the United States.

2. In holding that the Federal Rules of Civil Procedure are in all respects applicable to Tucker Act cases.

3. In construing Rule 17 (b) of the Federal Rules of Civil Procedure as referring to the right to maintain an action under Section 795 of the New York Civil Practice Act.

4. In holding that Rule 17 (b) of the Federal Rules of Civil Procedure, as so construed, authorizes the maintenance of this action against the United States under the Tucker Act.

5. In holding that the joinder of respondent's judgment debtor as a codefendant with the United States did not deprive the District Court of jurisdiction under the Tucker Act.

6. In holding that the grant of authority to maintain this action under Section 795 of the New York Civil Practice Act did not violate Revised Statutes 3477.

7. In holding that the United States is a "person" within the meaning of Section 795 of the New York Civil Practice Act.

8. In holding that the suit of the United States against Kaiser and his surety should be consolidated with the instant action under the Tucker Act.

9. In reversing the judgment of the District Court of the United States for the Eastern District of New York.

REASONS FOR GRANTING THE WRIT

The specific questions presented in this case are whether, consistently with Revised Statutes 3477, a state court may authorize a creditor to sue the United States on the claim of its debtor, and whether a district court sitting as a court of claims has jurisdiction to entertain such an action under the Tucker Act and the Federal Rules of Civil Procedure. The basic issue, however, is whether garnishment or other third-party actions may be maintained against the United States. This Court has recently held that government corporations which are subject to suit generally are subject to garnishment. *Federal Housing Administration* v. *Burr*, 309 U. S. 242. In extending the doctrine of the *Burr* case to third-party proceedings against

the United States under the Tucker Act, the court below has decided a question of far-reaching importance which should be settled by an authoritative decision of this Court.

1. In holding that this action may be maintained consistently with Revised Statutes 3477, the court below has announced a novel and important exception to the statute and ignored the policy of the statute and the principles established by this Court in its construction.

Revised Statutes 3477 declares that any transfer or assignment of a claim against the United States or any power of attorney to receive payment of such claim shall be null and void unless made after the allowance of the claim, the ascertainment of the amount due, and the issuance of a warrant for payment. Admittedly, the claim of the respondent's judgment debtor has never been ascertained or allowed; on the contrary, the contract on which that claim is based is the subject matter of a separate suit by the United States against the judgment debtor for breach.

The suggestion of the court below that Section 795 of the New York Civil Practice Act does not bring about a transfer or assignment of the claim (R. 38) is beside the mark, since Revised Statutes 3477 expressly prohibits powers of attorney as well as assignment or transfer. And in holding that the assignment, if any, is one by operation of law and hence not prohibited by the statute, the court

266728—40——2

below misapplied the decisions of this Court. The purpose of the statute, as this Court has held, is to protect the Government against the danger of "becoming embroiled in conflicting claims, with delay and embarrassment" and against being "harassed by multiplying the number of persons with whom it had to deal." *Martin* v. *National Surety Co.*, 300 U. S. 588, 594; *Hobbs* v. *McLean*, 117 U. S. 567, 576. Where all the claimant's property is transferred by operation of law to the claimant's legal successor, whether by descent (cf. *Erwin* v. *United States*, 97 U. S. 392, 397), corporate reorganization (*Seaboard Air Line Ry.* v. *United States*, 256 U. S. 655), purchase at a judicial sale (*Western Pac. R. R. Co.* v. *United States*, 268 U. S. 271), or some other change in the claimant's legal status, the Government is not embarrassed by the assignment, and Revised Statutes 3477 is, therefore, inapplicable. For the same reason, a purely voluntary assignment of all of the claimant's assets for the benefit of creditors is not within the purview of the statute. *Goodman* v. *Niblack*, 102 U. S. 556. In all of such cases, the number of persons with whom the Government must deal is not changed, the Government is not embarrassed in the administration of its business, the availability to the Government of counterclaims is in no way interfered with, nor is the ability of the Government to compromise or settle mutual claims impaired.

There is nothing in these decisions to suggest that a creditor may be permitted by court order to sue on an individual claim of his debtor to the extent of the creditor's interest. The creditor in such case is not a general representative with respect to all of the claimant's assets, and his interest and that of the claimant may therefore conflict. The claimant might be willing to release or reduce its claim against the Government in exchange for a reduction in the Government's demand. The creditor, however, has no interest in effecting such a settlement. The effect of authorizing him to sue to the extent of his interest would thus be not only to multiply the number of persons with whom the Government must deal, but to embarrass the conduct of its business.

Such actions should not be excepted from the operation of Revised Statutes 3477 in the absence of an authoritative decision of this Court. There is no such decision. The case of *Price* v. *Forrest,* 173 U. S. 410, relied on by respondent in the court below, is not in point. In that case, as in *Houston* v. *Ormes,* 252 U. S. 469, the claim had been ascertained and allowed, and the Government was merely in the position of a stakeholder, the duty of the government officer to pay being ministerial only and enforceable by mandamus.

2. The decision of the court below that the action is not precluded by Revised Statutes 3477 is in direct conflict with the decision of the Court of

Claims in *Howes & Co.* v. *United States,* 24 C. Cls. 170. In that case the Court of Claims held that an order of a state court, made pursuant to a local statute, appointing a receiver to prosecute an individual claim against the United States was invalid under Revised Statutes 3477. The court concluded that "Should the practice of making such attachments become common, as it no doubt would if sustained," the Government would become "involved in controversies between such claimants and their creditors" and "the business and responsibilities of the accounting officers would be largely extended and the liability of frauds upon the Treasury by errors and otherwise would be greatly increased." *Id.* at 184.

3. In holding that the action was within the jurisdiction of the district courts sitting as a court of claims notwithstanding the joinder of the judgment debtor as a party defendant, the decision of the court below is in conflict with several decisions of the Court of Claims.

Section 795 of the New York Civil Practice Act requires that the debtor be made a party defendant and provides for the disposition, by the judgment in the authorized action, of any amount recovered in that action in excess of that required to pay the creditor's judgment costs or expenses allowed by the court. The court below expressly recognized that, in addition to the controversy between the claimant and the United States, the case involves a separate controversy between the

claimant and the creditor (R. 37–38, 42). Cf. *Howe & Co.* v. *United States,* 24 C. Cls. 170, 184–185. It held, however, that the district court had jurisdiction to "adjudicate separate issues" in which the United States is not directly interested (R. 37–38). This decision, as the court itself observed, is in conflict with the decisions of the Court of Claims holding that the jurisdiction conferred by the Tucker Act is limited to claims against the United States, and does not confer authority to adjudicate controversies between private persons, and that such persons, therefore, cannot be made parties defendant in the Court of Claims. *Jackson* v. *United States,* 27 C. Cls. 74, 84–85; *Waite* v. *United States,* 57 C. Cls. 546; *Leather and Leigh* v. *United States,* 61 C. Cls. 388, 390. These decisions of the Court of Claims cannot be distinguished on the ground that this action was brought in the district court. So far as concerns any separate controversy between the creditor and the claimant, the district court lacked any jurisdiction, there being neither diversity of citizenship nor a federal question. Under the Tucker Act, the jurisdiction of the district court sitting as a court of claims is as limited as that of the Court of Claims, and carries with it no ancillary jurisdiction to determine controversies between private parties.

4. The decision of the court below that, under Rule 17 (b) of the Federal Rules of Civil Pro-

cedure, state law is determinative of the right to sue, is in conflict with settled principles and with the considered language of the Circuit Court of Appeals for the Fifth Circuit in *Lynn* v. *United States,* 110 F. (2d) 586. In essence, the court below held that the Rules constitute an enlargement of the jurisdiction of the district courts under the Tucker Act. It is a matter of considerable importance to the Government to know what impact, if any, the Rules have upon the Tucker Act, particularly when the views expressed in another circuit run contrary to the holding below.

Rule 17 (b) provides that "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile." This rule seems plainly inapplicable in the instant case. Contrary to the conclusion of the court below (R. 37), the question involved is one of jurisdiction, and not of the manner of its exercise. The respondent's personal capacity to sue and be sued is not in controversy. There is no suggestion that respondent is without capacity to sue by reason of infancy, insanity, alienage, coverture or any other disqualification to which Rule 17 (b) is intended to apply. The question is whether the Tucker Act confers jurisdiction on the district courts to entertain an action involving separate issues between third parties in which the United States has no interest. On this

issue the law of New York is not controlling. The states are without power to regulate the jurisdiction of the federal courts. *Monra* v. *United States,* 303 U. S. 36, 41; *Penn Co.* v. *Pennsylvania,* 294 U. S. 189, 197. Rule 17 (b) does not enlarge the power of the states in this respect. The Federal Rules of Civil Procedure relate to matters of procedure alone, and do not extend or limit the jurisdiction or venue of the district courts in any manner (Rule 82). Certainly, the Rules were not intended to subject the United States to suit in any court at the will of the states. It is, therefore, difficult to understand the conclusion of the court below that consent to sue is conferred by the Tucker Act "and Rule 17 (b)" (R. 42).

The decision is in conflict with the considered views of the Circuit Court of Appeals for the Fifth Circuit in *Lynn* v. *United States, supra.* In that case an action was brought against the United States under the Tucker Act and against the Tennessee Valley Authority under the Act of its creation, authorizing it to sue and be sued in any court of competent jurisdiction. The actions were sought to be joined under Rule 20. The Circuit Court of Appeals held that an action under the Tucker Act is neither an action at law nor a suit in equity and that the Federal Rules of Civil Procedure were, therefore, inapplicable. *Id.* at 588–589. While it is unnecessary to go so far in order

to hold that the Rules do not enlarge the Government's amenability to suit, the opinion in the *Lynn* case sufficiently indicates that the question of the extent of the application of the Rules to Tucker Act proceedings is one of importance which should be settled by this Court.

5. In holding that Congress consented to suits of this character by granting jurisdiction to determine claims against the United States, the court below relied on *Federal Housing Administration* v. *Burr*, 309 U. S. 242. In that case this Court held that the Administration was subject to garnishment under Section 1 of the National Housing Act authorizing the Administrator "to sue and be sued in any court of competent jurisdiction, State or Federal". Although the decision would seem to be limited to cases "where federal governmental corporations are concerned" (*id.* at 245), the court below concluded that "In the light of the *Burr* case the question whether garnishment or like process may be brought on a Tucker Act claim must be reexamined" (R. 39). The opinion below, it is true, disclaims any intention of making such a "general reexamination" (R. 39), but it is difficult to distinguish the present action from any other third-party proceeding involving separate issues between private parties. The question whether the *Burr* case should be extended to Tucker Act proceedings is thus squarely presented and seems

plainly of such importance as to require an authoritative decision of this Court.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

OCTOBER 1940.

APPENDIX

Section 24 (20) of the Judicial Code, 28 U. S. C. 41 (20) provides in part:

> Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

Section 3477 of the Revised Statutes, 31 U. S. C. 203, provides in part:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall

be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. * * *

Section 795 of the New York Civil Practice Act provides:

Action by judgment-creditor against third party. Where it appears from the examination or testimony taken or other proof satisfactory to the court that a person or corporation is indebted to the judgment-debtor, the court may make an order authorizing the judgment creditor to maintain an action against such person or corporation for the recovery of such debt. Such order may also forbid the transfer or other disposition of such debt until an action can be commenced and prosecuted to judgment and may direct that the papers or proof in the possession or control of the debtor and necessary in the prosecution of such action be delivered to the creditor or impounded in court. Such order or the judgment entered in the authorized action may provide for the disposition of any moneys in excess of the sum required to pay the creditor's judgment,

costs, disbursements and expenses allowed by the court. Such action by a judgment creditor against the debtor of the judgment debtor shall make the judgment debtor a party defendant, and costs shall be awarded as prescribed by law; but if judgment be in favor of the judgment creditor and against the debtor of the judgment debtor, and the debtor of the judgment-debtor did not dispute the indebtedness, then costs are not to be awarded against the debtor of the judgment debtor.

Rule 17 (b) of the Federal Rules of Civil Procedure provides:

Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

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